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[B-194521]

Compensation—Part-Time Employees—Overtime, Premium Pay, etc.—Compensatory Time—Entitlement—Work Over 40 Hours

Except in limited circumstances where prohibited for nonexempt employees under the FLSA, part-time employees may be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work performed in excess of 40 hours in an administrative workweek and 8 hours in a day. 5 U.S.C. 5542 and 5543. A part-time employee may not be granted compensatory time off simply because he works hours in excess of his regular part-time tour of duty.

Employment—Ceilings—Part-Time, etc. Employees—Computation Basis

Part-time employees, irrespective of nature of employment, currently may be counted against full-time permanent and total employment ceilings of agency. Effective October 1, 1980, under 5 U.S.C. 3404, part-time employees will be counted fractionally based upon number of hours worked.

Matter of: Evan J. Kemp, Jr.—Compensatory Time Off and Personnel Ceilings for Part-Time Employees, February 4, 1980:

This action is in response to a request by Mr. James H. Schropp, Assistant General Counsel, Office of the General Counsel, on behalf of the Securities and Exchange Commission (SEC), for a written opinion by the General Accounting Office in connection with a stipulation of settlement entered into by the SEC with its employee, Mr. Evan J. Kemp, Jr., in Civil Action No. 77-2014 in the United States District Court for the District of Columbia. The settlement provides for the dismissal of Mr. Kemp's suit against the Commission alleging discrimination on account of sex and handicapping condition.

As part of the settlement agreement, the SEC agreed to request written opinions from appropriate agencies of the Federal Government regarding Government policy towards part-time workers. In particular, the Commission agreed to request this Office:

> to opine that agencies have the authority to provide compensatory time to employees who normally are officially assigned to work fewer than 40 hours per week but who are requested, on occasion, to work beyond their normal part-time tour of duty.

In addition, the Commission agreed, "unless prohibited by law," to issue a memorandum to all of its Division and Office Heads, Administrative Officers and Aides, and all supervisory personnel, indicating that:

> * * * part-time employees will be counted fractionally (i.e., the number of hours worked per week divided by 40 hours per week). For example, if a part-time employee works 20 hours per week, he or she would be counted as ½ of an employee, if 30 hours are worked, he or she would be considered as ¾ of an employee.

Mr. Schropp, on behalf of the SEC, also requests that this Office provide a written opinion as to the legality and propriety of counting

part-time employees fractionally against an assigned manpower ceiling.

Section 5543, title 5, United States Code (1976), provides for granting an employee compensatory time off from his scheduled tour of duty in lieu of payment of overtime compensation for irregular or occasional overtime work. Under this section the head of an agency may, on request of an employee, grant compensatory time off in lieu of overtime. However, as to employees whose rates of basic pay are in excess of the maximum rate of basic pay for grade GS–10, section 5543(a)(2) gives the head of an agency authority to require that he be granted compensatory time off from his scheduled tour of duty instead of being paid overtime. The regulations implementing this statutory provision are found in 5 C.F.R. § 550.114 (1979).

Although the cited regulatory and statutory provisions do not explicitly state that compensatory time off is another form of premium compensation for irregular or occasional overtime work, it is well established that compensatory time takes the place of monetary premium pay for irregular or occasional overtime. See 37 Comp. Gen. 362 (1957) and *Matter of Jacqueline Bailey*, B–164689, March 26, 1976. Since compensatory time off may be granted only in lieu of overtime compensation for irregular or occasional overtime work, the question of whether this benefit is available to employees for work beyond their normal part-time tours of duty depends upon their entitlement to overtime compensation for those hours of work.

The provisions of title 5 of the United States Code regarding payment of overtime compensation are codified in 5 U.S.C. § 5542 (1976). Section 5542 was amended by Public Law 92–194, December 15, 1971, 85 Stat. 648, to provide for payment of overtime compensation to employees with "full-time, part-time, and intermittent tours of duty" for hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day. Prior to this amendment decisions of this Office held that part-time employees, while entitled to overtime compensation for hours worked in excess of 8 per day, were not entitled to payment of overtime compensation for hours worked in excess of 40 per week. 46 Comp. Gen. 337 (1966). However, since the enactment of Public Law 92–194, part-time as well as intermittent employees are entitled to overtime compensation for work they perform in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Therefore, part-time and intermittent employees may be granted compensatory time off in lieu of overtime compensation only for irregular or occasional overtime work performed in excess of 40 hours in an administrative workweek or 8 hours in a day. A part-time employee may not be granted compensatory

time off simply because he works hours in excess of his regular part-time tour of duty.

While a "nonexempt" employee may be granted compensatory time off in limited circumstances based on his entitlement to overtime compensation under title 5 of the United States Code, no provision is made under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976), for the allowance of compensatory time off in lieu of FLSA overtime pay. With regard to the granting of compensatory time off to nonexempt employees, see Federal Personnel Manual Letter 551–6, June 12, 1975.

With respect to the legality and propriety of counting part-time employees fractionally against an assigned manpower ceiling, we would point out initially that two kinds of employment ceilings are established for each Federal agency, namely, (1) full-time permanent employment and (2) total employment. By subtracting the full-time permanent employment ceiling from the total employment ceiling, the difference, referred to as a "derived ceiling," becomes, in effect, a limitation on the number of part-time, temporary, and intermittent employees. All employment is subject either to the actual full-time employment ceiling or to the derived ceiling. As to employment ceilings, a part-time employee, regardless of the nature of his or her employment, is one who works less than 40 hours a week. The employment may be regular and recurring (permanent); for a temporary period; or intermittent in that the person works only when called in. However, irrespective of the nature of the employment, it is subject to the derived ceiling.

Part-time employees can be hired against vacancies in the derived ceiling as well as against vacancies in the full-time permanent ceiling. In the event the derived ceiling is not high enough to meet an agency's legitimate needs for part-time employment, an attempt should be made to accommodate the part-time employee within the full-time permanent ceiling. If this accommodation is not possible, the agency can make application to the Office of Management and Budget for the conversion of spaces from the full-time permanent ceiling to the derived ceiling to permit the splitting or fractionalizing of full-time jobs. In other words, under present law and regulations, application of the personnel ceiling does not necessarily require an agency to count a part-time employee as the equivalent of a full-time employee or reduce the total man-hours of employment available to the agency. See Federal Personnel Manual, chapter 312, appendix B, 1969 edition, as amended.

The Federal Employees Part-Time Career Employment Act of 1978, Public Law 95–437, October 10, 1978, 92 Stat. 1056, codified at 5 U.S.C. §§ 3401–3408, narrows the definition of part-time career employment from a scheduled tour of duty of less than 40 hours per week to a

scheduled tour of duty of between 16 and 32 hours per week. Interim regulations implementing this Act were published at 5 C.F.R. §§ 340.101–340.204 (1979). Final regulations effective October 5, 1979, were published in 44 Fed. Reg. 57379. In regard to personnel ceilings, 5 U.S.C § 3404 provides that, effective October 1, 1980, in administering the personnel ceiling applicable to an agency, a part-time career employee will be counted as a fraction which is determined by dividing 40 hours into the average number of hours of the employee's regularly scheduled workweek. Thus, effective October 1, 1980, there would appear to be no legal impediment to issuing the memorandum contemplated by the settlement agreement.

The questions posed by the SEC under the stipulation of settlement are answered accordingly.

[B–195785]

Treasury Department—Bureau of Engraving and Printing—Prevailing Rate Employees—Pay Increase Ceiling Applicability

Bureau of Engraving and Printing trade and craft employees whose pay is set administratively under 5 U.S.C. 5349(a), "consistent with the public interest," were properly limited to 5.5 percent wage increase in fiscal year 1979. Although pay increase limitation in 1979 appropriation act did not apply to these Bureau employees, agency officials properly exercised discretion to limit pay increases in the public interest in accordance with the President's anti-inflation program. See court cases cited. The fact that similar employees of Government Printing Office received higher wage increases is not controlling since they were not covered by appropriation act limitation or President's determination.

Matter of: Bureau of Engraving and Printing—Limitation on Wage Increase—Fiscal Year 1979, February 6, 1980:

The issue presented for our decision is whether certain trade and craft employees of the Bureau of Engraving and Printing, Department of the Treasury, are entitled to a 6.8 percent wage increase effective June 18, 1979, or whether that wage increase is subject to the 5.5 percent pay limitation for fiscal year 1979 contained in an appropriation act and a Presidential Memorandum. This decision is in response to requests from the International Association of Machinist and Aerospace Workers and the Graphic Arts International Union. The Bureau employees in question received a 5.5 percent increase effective June 18, 1979, but the remainder of the 6.8 percent increase was delayed until October 1, 1979.

The employees involved in the request are those trade and craft employees of the Bureau whose positions are comparable to positions at the Government Printing Office for which the pay is set by negotiations under the Kiess Act, 44 U.S.C. § 305. Historically these employees

of the Bureau have received the same wage increases as the comparable employees of the Government Printing Office (GPO). Pursuant to the Kiess Act, the GPO employees received a 6.8 percent wage adjustment effective June 18, 1979. This increase for the specified GPO employees was determined by a fact finder and approved by the Joint Committee on Printing after the unions and the Public Printer had reached a bargaining impasse. The Bureau of Engraving and Printing, however, has refused to allow a raise of more than 5.5 percent during fiscal year 1979. The unions argue that since the pay rates for Bureau and GPO employees have always been identical, the Bureau is required to grant the full increase, particularly since these Bureau employees are excluded from the pay setting provisions of Public Law 92-392, 5 U.S.C. § 5341 *et seq.*

The first question to be addressed is whether the pay increase of the specified Bureau employees is subject to the pay increase ceiling of 5.5 percent for fiscal year 1979 contained in section 614(a) of the Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. 95-429, 92 Stat. 1018, October 10, 1978. Section 614(a) provides, in pertinent part, that:

> No part of any of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act, may be used to pay the salary or pay of any individual in any office or position in an amount which exceeds the rate of salary or basic pay payable for such office or position on September 30, 1978, by more than 5.5 percent, as a result of any adjustments which take effect during such fiscal year under—
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> * * * * * * *
>
> (3) section 5343 of title 5, United States Code, if such adjustment is granted pursuant to a wage survey (but only with respect to prevailing rate employees described in section 5342(a)(2)(A) of that title).

We have held that section 614(a)(3) applies only to wage adjustments made pursuant to wage surveys conducted under 5 U.S.C. § 5343 and, accordingly, that it is not applicable to pay adjustments made through negotiation under section 9(b) of Public Law 92-392. See *Department of the Interior*, 58 Comp. Gen. 251 (1979), and *Saint Lawrence Seaway*, B-193573, January 8, 1979. Similarly, we believe that section 614(a)(3) is not applicable to the pay adjustments of these employees of the Bureau provided under 5 U.S.C. § 5349(a).

The pay of the trade and craft employees of the Bureau involved here is determined under 5 U.S.C. § 5349(a) which provides, in pertinent part, that the pay shall be:

> * * * fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and in accordance with such provisions of this subchapter, including the provisions of section 5344, relating to retroactive pay, and subchapter VI of this chapter, relating to grade and pay retention, as the pay fixing authority of such agency may determine * * *.

Section 5349 was enacted by Public Law 92-392, approved August 19, 1972, 86 Stat. 564, which provided a statutory basis for adjusting

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pay rates for prevailing rate employees of the Federal Government and was codified in subchapter IV of chapter 53, title 5, United States Code. Trade and craft employees of the Bureau are clearly excluded from coverage under subchapter IV except for the purposes of section 5349. See 5 U.S.C. §§ 5342(a) (1) (I) and (b) (2) (A). In addition, the legislative history of Public Law 92–392 evidences a clear intent to exclude the Bureau from coverage under this subchapter and to allow the Bureau to follow its existing pay practices. See S. Rep. No. 92–791, 92d Cong., 2d Sess., reprinted in (1972) U.S. Code Cong. & Ad. News 2980, 2985, and H.R. Rep. 92–339, 92d Cong., 1st Sess. 19 (1971).

Since the wage adjustments of the Bureau employees are determined under an agency-controlled pay system pursuant to section 5349(a) and are not based on wage surveys under section 5343, we conclude that these wage adjustments are not subject to the pay limitation for fiscal year 1979 contained in section 614(a) of Public Law 95–429.

The second question to be addressed is whether the wage adjustment of these Bureau employees is subject to the 5.5 percent limitation set forth in the President's Anti-Inflation Program. On January 4, 1979, the President issued a memorandum to the Heads of Executive Departments and Agencies on Federal Pay and the Anti-Inflation Program. He stated that pay increases for most Federal employees—those in the General Schedule and related pay systems, members of the uniformed services, and most of those in the Federal wage system—had been limited by the Administration and the Congress to 5.5 percent for fiscal year 1979. However, since many nonappropriated fund employees and other groups of workers were not covered by the same limitation, the President stated, in pertinent part, that:

> In order to ensure that proposed pay increases for other pay systems do not exceed the maximums for Federal pay that the Congress and I have set, the policy of this Administration is:
>
> In the public interest to control inflation, each officer or employee in the executive branch who has administrative authority to set rates of pay for any Federal officers or employees should exercise such authority, to the extent permissible under law, treaty, or international agreement, in such a way as to ensure that no rate of pay for any category of officers or employees is increased more than 5.5 percent during fiscal year 1979. * * *

Pursuant to the President's memorandum, the Treasury Department and the Bureau of Engraving and Printing issued memorandums dated January 17 and February 2, 1979, respectively, stating that the President's policy would cover Bureau employees paid under the Treasury approved system (described above). The President's 5.5 percent ceiling policy was also cited in the memorandum from the Under Secretary of the Treasury dated October 9, 1979, denying the request from the Director of the Bureau for higher wage increases for these Bureau employees retroactive to June 18, 1979.

As shown above, the pay of the employees in question is set administratively in accordance with the prevailing rates and "consistent with

the public interest." See 5 U.S.C. § 5349(a). The President and Treasury officials have determined it is in the public interest to limit pay increases to 5.5 percent and, as recent court decisions have held, this is a reasonable exercise of agency discretion. See *National Federation of Federal Employees* v. *Brown*, Civil Action No. 78–2252 (D.D.C. Nov. 20, 1979), and *American Federation of Government Employees* v. *Brown*, Civil Action No. 78–2301 (D.D.C. Nov. 20, 1979). In these cases, the unions had argued that nonappropriated fund activity employees, who were not covered by the pay limitation contained in section 614(a) of Pub. L. 95–429, were entitled to a wage increase in excess of 5.5 percent. However, the District Court found that the wage increases were subject to the Presidential memorandum and were therefore properly limited to 5.5 percent for fiscal year 1979.

As noted above, despite the tandem relationship between certain employees of GPO and the Bureau, the GPO employees received a 6.8 percent wage increase effective June 18, 1979, while a similar increase was delayed for comparable Bureau employees until October 1, 1979. As was pointed out by the fact finder who recommended the 6.8 percent increase for GPO employees, the wage adjustment for GPO employees is not subject to the 5.5 percent ceiling contained in section 614(a) of Pub. L. No. 95–429 since GPO wage adjustments are determined through negotiation under 44 U.S.C. § 305 and 5 U.S.C. § 5349. In addition, since GPO is not an executive department or agency, it is not subject to the President's anti-inflation memorandum of January 4, 1979.

We find no basis upon which to overturn the "public interest" determination made by the Department of the Treasury. Accordingly, we hold that the specified employees of the Bureau of Engraving and Printing are not entitled to a wage adjustment in excess of 5.5 percent during fiscal year 1979.

[B–196075]

Contracts — Awards — Federal Aid, Grants, etc. — By or For Grantee—Review—Failure to Use Agency Protest Procedure Effect

Request to reinstate General Accounting Office (GAO) review of grant related procurement complaint is denied where complainant voluntarily did not first seek resolution of its complaint through established Environmental Protection Agency (EPA) protest process which is part of EPA grant administration function. Intent of GAO in conducting review of complaints under Federal grants is not to interfere with grantor agencies' grant administration function.

Matter of: Sanders Company Plumbing and Heating, February 6, 1980:

Sanders Company Plumbing and Heating (Sanders) complains that the City of Kansas City, Missouri (grantee), improperly awarded

a contract substantially funded by a grant from the Environmental Protection Agency (EPA) under title II of the Clean Water Act, 33 U.S.C. §§ 1281 *et seq.* (1976).

Sanders filed its complaint with our Office without first having filed a protest with the grantee in accordance with the EPA protest procedures pursuant to 40 C.F.R. § 35.939 (1979). We initially dismissed the complaint without prejudice as we believed that a review of the complaint was in process by the grantee and EPA under EPA's procedures. However, Sanders subsequently informed us that its complaint was never the subject of a formal administrative review by EPA and requested that consideration of its complaint be reopened. Although a report was initially requested from EPA regarding the merits of Sanders' complaint, we have determined upon further review that we will not review this complaint.

As reflected in the Public Notice published at 40 Fed. Reg. 42406 (September 12, 1975), our review of grant related contracting practices stems from our recognition of the amount of money involved in federally funded programs. Complaints such as Sanders' are reviewed because we believe it is useful to "audit by exception," using specific complaints as vehicles through which to review contracting practices and procedures followed and compliance with requirements set out in grant instruments. In this regard, we believe it is important to examine the method by which the grantor reviews its grantees' procurement decisions in discharge of the grantor's responsibilities to assure that the requirements for competitive procurement have been met. *Thomas Construction Company, Incorporated*, 55 Comp. Gen. 139, 142 (1975), 75-2 CPD 101. Indirectly, of course, it is our hope that GAO review will foster grantee compliance with grant terms, agency regulations, and applicable statutory requirements.

In principle, we believe our objectives can be achieved most effectively if prospective contractors seek meaningful relief available at the grantee or grantor-agency level. The EPA protest process is an established procedure for identifying and resolving problems concerning grantee procurements. The agency attempts to use specific complaints as a vehicle through which to review contracting practices and procedures as part of EPA's primary responsibility in making and administering grants. As stated in our Public Notice, *supra*, it is not our intention in conducting our review to interfere with the functions and responsibilities of grantor agencies in administering grants. Since Sanders has chosen not to prosecute its complaint before the grantee under the EPA protest procedures we now decline to consider the complaint as such action would tend to undermine the effectiveness of EPA's grant administration function.

We note, however, that another unsuccessful bidder on the subject procurement who prosecuted its complaint under the EPA protest procedures has requested our review. Consequently, although we decline to consider Sanders' complaint, we nevertheless will be undertaking a review of the grantee's procurement, thereby enabling us to meet our objectives as outlined above.

Sanders' request to reopen the complaint is denied.

[B–194339]

Subsistence — Per Diem — Military Personnel — Rates — Lodging Costs — Double Occupancy

A military member traveling on temporary duty shared a lodging accommodation with another person (his wife) who was not entitled to lodging at Government expense. In the absence of regulations providing otherwise, if he would have used the same accommodation at the single occupancy rate had he not been accompanied, he may be reimbursed on the basis of such single occupancy rate rather than at one-half of the double occupancy rate. If the hotel makes no distinction in rates between single and double occupancy, then the member may be reimbursed on the basis of the full room cost.

Matter of: Lieutenant Commander Richard E. Tisdel, USN, February 7, 1980:

A certifying officer of the Defense Intelligence Agency requests our decision as to whether Lieutenant Commander Richard E. Tisdel's per diem may be computed by using the full cost of hotel accommodations he shared with his wife while on temporary duty in France. Lieutenant Tisdel objected to the initial processing of his travel voucher which limited reimbursement to the single rate for hotel occupancy.

The general rules which have been applied in similar situations involving civilian employees are as follows. The only travel expenses the Government is obligated to pay are those of the individual employee. Any additional expenses incurred because his family accompanies him are personal expenses to be borne by him. B–158941, May 4, 1966. However, if the cost of the hotel would have been the same if the employee had been alone—that is, in effect, if the hotel made no distinction in rates between single and double occupancy—then the employee is entitled to reimbursement on the basis of the full room charge paid. In the usual case in which the rates for single and double occupancy differ, we have held that a traveler may be reimbursed on the basis of the single occupancy rate rather than at one-half of the double occupancy rate so long as he would have used the same accommodation had he not been accompanied. B–187344, February 23, 1977. In the absence of regulations prescribed under 37 U.S.C. 404 and 405 (1976), providing a method for determining allowable per diem for military members in such cases, similar rules should be applied here.

From the record submitted, it is not clear which of these factual situations applies; however, it appears that the hotel where Commander Tisdel stayed did have a single occupancy rate which presumably would have been charged had he been alone. If that is the case, that rate should be used in computing his per diem. The certifying officer needs to determine the facts and then certify the appropriate allowable amount.

[B-195155]

Leaves of Absence—Compensatory Time—Overtime Adjustment—Fair Labor Standards Act—Nonexempt Employees

Nonexempt employee under Fair Labor Standards Act performed overtime during summer in exchange for compensatory time. Civil Service Commission made determination that employee is entitled to payment of overtime under FLSA; payment is proper with offset of the value of compensatory time granted. Since supervisor did not have authority to order or approve overtime, there is no entitlement to compensatory time under title 5, United States Code. Erroneous payments of compensatory time not used as offset may be considered for waiver under 5 U.S.C. 5584.

Matter of: Marion D. Murray, February 7, 1980:

Mr. Arthur H. Nies, Acting Deputy Director, Administrative Management, Science and Education Administration, United States Department of Agriculture, requests a determination as to whether Mr. Marion D. Murray, an Agricultural Research Technician with the Department's Agricultural Research Service in Columbia, Missouri, is entitled to the payment of overtime compensation for hours of work performed during the period from 1966 to 1976. The submission involves a review of the determination by the United States Civil Service Commission (Commission) (now the Office of Personnel Management) that Mr. Murray is entitled to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (1976). The agency questions the propriety of the Commission's findings.

The record shows that from 1966 to 1976 Mr. Murray was called upon by his immediate supervisor to perform overtime work, as necessary, for approximately 8 weeks each year during the summer growing season. Mr. Murray and his immediate supervisor, Drs. Coe and Doyle, agreed that Mr. Murray would be allowed an hour off as compensatory time for each hour of overtime.

The agency states that neither Dr. Coe nor Dr. Doyle had the authority to order or approve overtime work during the periods in question. We have been informally advised that the administrative officers, vested with the authority to order or approve hours of overtime work, were not aware of the overtime work by Mr. Murray. Neither the hours of overtime worked by Mr. Murray nor the hours of compensatory time

used were recorded in his official Time and Attendance Reports until after 1976.

Mr. Murray claims overtime compensation on the basis that he was not advised that he could have received overtime compensation, rather than compensatory time, for each hour of overtime.

Sections 71a and 237 of title 31 of the United States Code (1976) require that all claims cognizable by the General Accounting Office be received in this Office within 6 years after the date such claim first accrued or be forever barred. Mr. Murray's claim was received by our Office on January 3, 1978, when the Claims Division received correspondence from Mr. Murray concerning his claim. Thus, that portion of Mr. Murray's claim for overtime compensation prior to January 3, 1972, may not be considered.

Overtime for Federal employees is authorized by title 5, United States Code, and also by the FLSA for nonexempt employees. An employee's entitlement to overtime compensation may be based on title 5, the FLSA or both.

Section 5542 of title 5, United States Code (1976), provides in pertinent part as follows:

> (a) * * * hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * *.

Only that overtime which has been officially ordered or approved in writing or induced by an official having authority to order or approve overtime work is compensable overtime. *Joan J. Shapira*, B–188023, July 1, 1977. Since Mr. Murray's overtime was not ordered, approved, or induced by proper authority there is no entitlement to overtime compensation under 5542. Mr. Murray would not be entitled to compensatory time under 5 U.S.C. 5543 (1976) since compensatory time may be granted only where the employee would be entitled to overtime compensation. Federal Personnel Manual, Chapter 550, Subchapter 1–3d, 5 C.F.R. 550.114 (1978) and 56 Comp. Gen. 219 at 222, 223 (1977).

The Fair Labor Standards Amendments of 1974, Public Law 93–259, approved April 8, 1974, extended FLSA coverage to certain Federal employees. Under 29 U.S.C. 504(f) the Civil Service Commission (Commission) (now the Office of Personnel Management) is authorized to administer the provisions of the FLSA. Under the FLSA a nonexempt employee becomes entitled to overtime compensation for hours worked in excess of 40 hours a week which management "suffers or permits" to be performed. See para. 3c of the Federal Personnel Manual (FPM) Letter No. 551–1, May 15, 1974. There is no entitlement to compensatory time off in lieu of overtime pay under the

FLSA. See para. A1 of Attachment 1 to Federal Personnel Manual Letter 551-6, June 12, 1975.

The United States Civil Service Commission, St. Louis Region, on February 23, 1978, determined that Mr. Murray, a nonexempt employee under the FLSA, was entitled to overtime compensation in the amount of $284.43 for overtime hours of work performed during the period July 1, 1976, to August 31, 1976.

The Commission considered that portion of Mr. Murray's claim dating from December 29, 1975, 2 years prior to the date it accepted his complaint, since court action to enforce FLSA payments must be brought within 2 years of the date the cause of action accrues. Subsequent to the Commission's determination regarding Mr. Murray's claim our Office held, in concurrence with the views of the Commission, that the applicable statute of limitations for the administrative consideration of FLSA claims filed by Federal employees is the 6-year statute of limitations under 31 U.S.C. 71a and 237 (1976). 57 Comp. Gen. 441 (1978). Accordingly, Mr. Murray may submit his claim to the Office of Personnel Management for its determination as to whether he is entitled to the payment of any additional overtime under the FLSA for the period retroactive to the effective date of the act's applicability to Federal employees, May 1, 1974.

The Commission's determination was based on the finding that the overtime was "suffered or permitted" as "management officials knew or had reason to believe that the work was performed."

The Commission determined that it was agreed that the 91¾ overtime hours which Mr. Murray worked during 1977 was representative of the number of overtime hours performed in the prior years. Thus, he was entitled to overtime compensation for 91¾ hours of work during the period July 1, 1976, to August 31, 1976.

Since he took compensatory time off on a one-for-one basis, the Commission offset the amount of overtime compensation he should have received for 91¾ hours of work by the value of the compensatory time. The Commission held that Mr. Murray was entitled to $284.43.

The agency questions the propriety of the award since Mr. Murray received compensatory time.

Since Mr. Murray is not entitled to compensatory time under title 5 or under the FLSA in lieu of overtime pay, the Commission properly found that the payment of compensatory time did not nullify his entitlement to overtime compensation. See para. A1c of Attachment 1 to FPM Letter 551-6. Mr. Murray may receive payment under the FLSA for those hours of overtime which the Commission determined he was suffered or permitted to work.

The payment of compensatory time, however, was an erroneous payment. The waiver act, 5 U.S.C. 5584 (1976) provides that an

erroneous payment may be waived where collection of the overpayment would be against equity and good conscience and not in the best interest of the United States. For those hours of work for which compensatory time was erroneously granted and for which overtime compensation is found due under the FLSA, the overtime payable under the FLSA would be greater than the value of the compensatory time. In such a situation, collection of the value of the compensatory time by way of offset would neither be against equity or good conscience nor in the best interest of the United States. See B–168323, December 22, 1969; see also 53 Comp. Gen. 264, 269 (1973). The Commission in determining Mr. Murray's overtime entitlement from July 1, 1976, to August 31, 1976, applied such an offset.

Those erroneous payments of compensatory time for hours of work which are not compensable under the FLSA, may be considered for waiver as there is no indication of fraud, misrepresentation, or lack of good faith on the part of Mr. Murray.

Mr. Murray's claim may be settled administratively in accordance with the above.

[B–195805, B–196036]

Contracts—Buy American Act—Defense Department Procurement—Waiver of Act—Memorandum of Understanding—Notice in Individual Procurements

Military department is not required to advise domestic offerors of existence of Memorandum of Understanding between United States and United Kingdom which provides basis for Secretary of Defense's determination that Buy American Act is inapplicable to Defense items manufactured in the United Kingdom.

Buy American Act—Defense Department Procurement—Validity of Award—Foreign Competition—Absence of Notice to Potential Contractors

Military department's failure to notify potential competitors that they may be in direct competition with United Kingdom firms does not invalidate procurement.

Matter of: Watkins-Johnson Company, February 7, 1980:

Watkins-Johnson Company (WJC) protests the Air Force's award of a contract to Rank Precision Industries, Inc. (RPI), under request for proposals (RFP) No. F34601–79–R–1887 issued by Tinker Air Force Base, Oklahoma.

WJC believes that the award to RPI is improper for two reasons: (1) the Air Force failed in its duty to advise WJC of the existence of the September 24, 1975, Memorandum of Understanding (MOU) between the United States (US) and United Kingdom of Great Britain and Northern Ireland (UK) Governments; and (2) the RFP

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did not contain a Notice of Potential Foreign Source Competition (Notice), Defense Acquisition Regulation § 7-2003.75 (1976 ed.). We are denying the protest since in our opinion neither reason provides a basis for invalidating the award.

The RFP restricted the procurement to three sources which the Air Force had previously approved. WJC knew that its two potential competitors had previously furnished goods which had been manufactured outside the United States. WJC also knew that its status, as a firm located in a surplus labor market area, together with imposition of the Buy American Act (Act), 41 U.S.C. § 10a-d (1976), price differentials would increase by 12 percent the evaluated prices of its competitors. Since the RFP did not contain the Notice, WJC concluded that it could increase its price over and above that which it would have charged had there been notice of possible foreign price competition. On July 23, 1979, 10 days prior to award, WJC telegraphed the Air Force emphasizing that it had furnished a certificate of compliance with the Act and that it was located in a designated surplus labor market area.

WJC contends that the Air Force was under a duty to advise it of the existence of the MOU. The MOU provides the basis for the Secretary of Defense's November 25, 1976, determination that the Act is inapplicable to Defense items manufactured in the UK. *Crockett Machine Company*, B-189380, February 9, 1978, 78-1 CPD 109. WJC's contention is founded on the following passage from the MOU:

> Each government will be responsible for bringing to the attention of the defense industries within its country, the basic understanding of the MOU, together with appropriate guidance on its implementation.

In our view the intent of the MOU, taken as a whole, is to increase the interchange of items of defense equipment between the two countries. We do not find an intent to maintain current domestic sources of supply, but rather an intent to increase the amount of defense equipment furnished by nondomestic sources. We believe that each government is to notify its own defense industry of the opportunity to trade, on an equal footing, in the previously protected defense item market of the other country. While the MOU states that each government will be responsible for advising its own defense industry of the basic understanding of the MOU and its application, we do not interpret this to require specific advice to any particular offeror in any given procurement. Consequently, we find no Air Force obligation to advise WJC of the existence of the MOU.

Regarding WJC's second contention, that the RFP was deficient for failure to include the Notice, we believe that it is good procurement practice to advise, where practicable, domestic firms of a potential waiver of the Act's application, since such warning can only

heighten the quality of competition offered by domestic firms. However, we have held that a military department's failure to notify all potential competitors that they may be in direct competition with UK firms which are eligible for the waiver does not invalidate a procurement. *Maryland Machine Tool Sales*, B–192019, July 6, 1978, 78–2 CPD 14.

Accordingly, the protest is denied.

[B–195614]

Contracts—Architect, Engineering, etc. Services—Grant-Funded Procurements—Brooks Bill Not Applicable *per se*

Grantee's solicitation requiring all responding architectural and engineering (A/E) professional services firms to furnish cost and pricing data, to be considered along with statement of qualifications in selection of A/E firm, is not shown to be contrary to terms of OMB Circular A–102, Attachment O, or Ohio law. A/E procurement procedures in 40 U.S.C. 541 (Brooks Bill), mandatory for Federal procurements for A/E services, are not *per se* applicable to grantee procurements.

Matter of: Sieco, Inc., February 8, 1980:

This is a complaint by Sieco, Inc. (Sieco) concerning the propriety of the procedures used for the procurement of architectural and engineering (A/E) services under Request for Proposals (RFP) A–78–WFS issued by the Licking County Regional Planning Commission, a grantee under Community Development Block Grant B–78–DN–39–0259 awarded by the U.S. Department of Housing and Urban Development (HUD).

Sieco complains that the grantee failed to comply with applicable Federal statutes and regulations for obtaining A/E professional services as required by Office of Management and Budget (OMB) Circular A–102, Attachment O. Sieco alleges that section 11.c.(5) of Attachment O prescribes that selection of A/E professional services by competitive negotiations shall be by the two-step method provided in the Brooks Bill, 40 U.S.C. 541 *et seq.* (1976). This method restricts the evaluation data that may be requested initially to the proposer's qualifications and requires that price negotiation be conducted with the highest ranked firm. If the procuring agency is unable to reach agreement with the highest-ranked A/E firm on a fair and reasonable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

Sieco does not argue that the Brooks Bill itself applies to the grantee's procurement. Rather, it maintains that Brooks Bill type procedures are made applicable here under HUD regulations which incorporate OMB Circular A–102, Attachment O. Sieco submits that the

grantee's procurement is defective because the grantee's solicitation required initial submission of both technical qualification data and cost and pricing data by each proposer instead of only qualification data. Sieco also maintains the grantee improperly reserved the right to make contract award on the basis of price alone without any subsequent negotiation or not to award on the basis of price alone and to negotiate simultaneously with all proposers.

We find that the Brooks Bill procedures do not apply to this procurement and have no objection to the manner in which the procurement was conducted.

HUD regulations require grantees of block grants to comply with the requirements of Attachment O of OMB Circular A–102, "Procurement Standards." 24 C.F.R. 570.507 (1979). Attachment O was revised on August 15, 1979; *see* 44 Fed. Reg. 47874 (1979). Sieco concedes that the grantee was not required to conduct this procurement in accordance with Brooks Bill type procedures under the superseded version of Attachment O but maintains that the new version applies here because the contract was not awarded by the grantee until October 1, 1979. Even under the new version of the Attachment, however, the grantee, in our opinion, was not required to conform to the Brooks Bill.

The current version of Attachment O states:

2. Grantee/Grantor Responsibility.

* * * * * * *

b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs conform to the standards set forth in this attachment and applicable Federal law.

* * * * * * *

11. *Method of Procurement.*

Procurement under grants shall be made by one of the following methods, as described herein: (a) small purchase procedures; (b) competitive sealed bids (formal advertising); (c) competitive negotiation; (d) noncompetitive negotiation.

* * * * * * *

c. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

* * * * * * *

(5) Grantees may utilize competitive negotiation procedures for procurement of Architectural/Engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitor selected subject to negotiation of fair and reasonable compensation.

The crux of Sieco's argument is that paragraph 11.c., read in total context, must be construed to mean that if the conditions for com-

petitive negotiations are satisfied and the grantee decides to use that method, then the provisions of subparagraph (5) "shall" apply. In other words, when selecting an Architect/Engineer by competitive negotiation, Sieco maintains that the two-step Brooks Bill method must be used.

We must reject this argument. While it is true that, as Sieco points out, paragraph 11.c. states that if competitive negotiation is used for a procurement under a grant, the "following" requirements "shall" apply, this is not dispositive of the issue. Instead, reference must be made to the more specific language of the individual subparagraphs. The first three subparagraphs, dealing with obtaining adequate competition, identifying the evaluation factors, and conducting the evaluation of proposals, clearly are mandatory requirements. Subparagraphs (4) and (5), however, by their own terms are permissive rather than mandatory, with subparagraph (5) providing that grantees "may" use competitive negotiation procedures for A/E professional services, which happen to resemble those of the Brooks Bill. That language does not, in our view, mandate the use of that procedure, but only allows it.

Moreover, our conclusion that the grantee was not required to employ Brooks Bill type procurement procedures here is consistent with Ohio law.

The record indicates that Ohio Rev. Code Ann. § 307.86 (Page 1979) constitutes the only state or local standard relevant to the procurement of the professional services under examination. The provision requires the use of competitive bidding *except*, in part, when A/E services are being procured. In that event, however, the statute does not prohibit the use of a process in which price competition is obtained. Rather, the state or local contracting authority has the discretion to determine what type of procurement it desires to conduct. We are unaware of any Ohio law that prohibits Ohio procurement officials or other purchasers from using a method of selecting an architect or engineer which requests price or fee information for A/E services prior to the selection of an A/E firm.

Based upon the above, the complaint is denied, as the grantee acted consistent with state law and OMB Circular A–102, Attachment O.

[B–196444]

Leaves of Absence—Compensatory Time—Set-Off—Against Excess Annual Leave Taken—Administrative Error

Question arising from labor-management negotiations asks whether an employee may use compensatory time to refund excess annual leave taken because it had

been credited to his account through administrative error, if such compensatory time would have been available for use at time that excess annual leave was taken. While payment for excess annual leave generally must be recovered under 5 U.S.C. 6302(f), alternatively, the employee's available compensatory time balance may be charged for the excess annual leave taken through administrative error as proposed in the submission. 58 Comp. Gen. 571 (1979), modified; 45 Comp. Gen. 243 (1965), distinguished.

Matter of: Use of compensatory time to refund excess annual leave, February 8, 1980:

The question presented asks whether an employee may use compensatory time to refund excess annual leave taken through administrative error, if such compensatory time would have been available for use at the time that the excess annual leave was taken. For the reasons stated below, we hold that the proposed use of compensatory time is proper.

A request for an advance decision was submitted by Mr. Alfred M. Zuck, Assistant Secretary for Administration and Management, Department of Labor, representing a proposal agreed to during recent negotiations with the Department's National Council of Field Labor Locals (NCFLL) on absence and leave policy. The NCFLL has been served with a copy of this request as required by our regulations governing Labor-Management cases, 4 C.F.R. Part 21 (1979).

Agencies, under certain conditions, may grant compensatory time off to an employee from his scheduled tour of duty instead of payment for time spent in irregular or occasional overtime work. However, the rules governing compensatory time are directed to the administration of premium pay, not annual leave.

In the situation presented here, where an employee has used excess annual leave which was credited to his account because of an administrative error, 5 U.S.C. 6302(f) (1976) provides as follows:

> An employee who uses excess annual leave credited because of administrative error may elect to refund the amount received for the days of excess leave by lump-sum or installment payments or to have the excess leave carried forward as a charge against later-accruing annual leave, unless repayment is waived under section 5584 of this title.

The Department of Labor believes that this section limits its authority to permit the use of compensatory time to liquidate excess leave charges as proposed by the union. Our decision, 45 Comp. Gen. 243 (1965), is cited for the proposition that in the absence of statutory authority, compensatory time may not be credited toward the balance of *advanced* annual or sick leave owed by an employee. However, no element of administrative error was involved in the advance of leave considered in that decision, and no statutory provision providing for alternate means of repaying the leave advanced existed at that time.

More recently, we have considered the import of 5 U.S.C. 6302(f) on repayment of excess leave charges. This provision was added as a

new subsection to section 6302 by section 4 of the 1973 amendments to the Annual and Sick Leave Act, Public Law 93–181, December 14, 1973, 87 Stat. 705, 706. Our review of the legislative history indicates that the purpose of this provision was to permit an employee the option of repaying an overcharge of leave by lump-sum or installment cash payments or by a charge against current or later accruing annual leave where formerly there was no authority for repayment by charging future leave earnings. See S. Rep. No. 93–491, 93d Cong., 1st Sess., November 9, 1973, 2, 4 (1973); and H.R. Rep. No. 93–456, 93d Cong., 1st Sess., September 10, 1973, 3, 7, 9 (1973). See also *Matter of Delores J. Copeland*, B–187692, October 13, 1977. Nothing in the legislative history cited deals with the use of existing compensatory time as a mode of repayment for an excess annual leave charge. Since this section increases the options available to employees to repay excess leave that was credited to their accounts through administrative error, it is properly classified as remedial legislation to be broadly interpreted to achieve its purpose.

We recognize that although compensatory time and annual leave are authorized by different statutory provisions and are governed by different regulations, in their use they are in many respects equivalent. If an employee has both annual leave and compensatory time to his credit and wishes to take time off from work, it does not matter, within the limits imposed by the applicable regulations, whether the employee charges his time off to annual leave or compensatory time. The net effect is the same, the employee has time off with full pay. As an example, in *Matter of Edward W. Dorcheus*, 58 Comp. Gen. 571 (1979), we held, in part, that an employee's annual leave balance could, with his consent, be reduced by the amount of compensatory time erroneously granted and used. While the situation is reversed here, the same principle may be applied. Therefore, we believe that allowing excess annual leave to be charged against compensatory time as proposed comports with the intent of section 6302(f), and the proposal, if finally agreed to by both parties, may be implemented.

[B–195401.2]

Contracts—Protests—Persons, etc. Qualified to Protest—Small Business Set-Asides—Protester Nonresponsible

Bidder found to be nonresponsible is not "interested" party under Bid Protest Procedures to protest against two bidders it contends submitted nonresponsive bids where other apparently responsive, responsible bidder exists and finding two bids to be nonresponsive would not lead to cancellation of invitation with possibility that protesting bidder could submit another bid under resolicitation.

Matter of: Therm-Air Mfg. Co., Inc., February 11, 1980:

Therm-Air Mfg. Co., Inc. (Therm-Air), protested any award to other than itself under Navy Ships Parts Control Center invitation for bids No. NOO104–79–B–0770. It contended that the bid of the low bidder was nonresponsive to the "Additional Ordering Data" clause in the invitation. It also contended that the bids of the third and fourth low bidders were nonresponsive for the same reason, noting that its bid and the bid of the high bidder (the Keco Corp.) were alone responsive to the requirement.

The contracting activity agreed with Therm-Air regarding the responsiveness of the low bid. However, the contracting activity declined to make the award to Therm-Air in view of the fact that Therm-Air was determined to be nonresponsible. The determination was forwarded to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC). We learned on January 29, 1980, that the SBA declined to issue a COC because Therm-Air did not, within the time permitted, rebut the nonresponsibility determination of the activity. Therm-Air still wishes to maintain its protest against any award to either of the two bidders whose bids are allegedly nonresponsive to the above-noted clause.

Therm-Air is not eligible to maintain a protest under the instant invitation. A party must be "interested" under our Bid Protest Procedures, 4 C.F.R. part 20 (1979), in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of the party's status in relation to the procurement (e.g., prospective bidder or offeror; bidder or offeror eligible for award; bidder or offeror not eligible for award; nonbidder or nonofferor) and the nature of the issues involved. See, generally, *American Satellite Corporation*, B–189551, April 17, 1978, 78–1 CPD 289.

From the facts presented by Therm-Air, even assuming that the bids of the third and fourth low bidders are nonresponsive, there is another bidder to whom an award could be made under the invitation. The contracting activity advises that this bidder is responsible, its bid is considered responsive, and its bid price is not unreasonable. Thus, the situation is analogous to where a non-8(a) firm or a nonsmall business protests even though it cannot bid and expect to receive an award under a solicitation limited in participation to 8(a) or small business firms, respectively. There we have held these parties not to be interested parties due to their lack of a substantial and direct interest in the procurement. *DoAll Iowa Company*, B–187200, September 23, 1976, 76–2 CPD 276; *Elec-Trol, Inc.*, 56 Comp. Gen. 730 (1977), 77–1 CPD 441. Since Therm-Air is ineligible to receive an

award under the invitation in question and since no apparent need will arise to resolicit the procurement (thereby permitting Therm-Air to rebid), Therm-Air does not have direct and substantial interest with regard to award under this solicitation. *Die Mesh Corporation*, 58 Comp. Gen. 111 (1978), 78–2 CPD 374.

Accordingly, the protest is dismissed.

[B–195786]

Contracts—Discounts—Price Adjustment Effect—Price Escalation Clause—Interpretation

Prompt payment discount may be applied to increase in contract price granted under price escalation clause where price is adjusted to reflect change in wholesale price indexes. Contrary holding by Armed Services Board of Contract Appeals applying discount only to original contract price is distinguishable as escalation in that that decision was granted only to adjust an increase in direct labor costs, and unlike instant case, application of discount to such price increase would have been inconsistent with purpose of escalation clause.

Matter of: Fermont Division of the Dynamics Corp. of America, February 12, 1980:

The Chief, Accounting and Finance Division, Office of the Comptroller, Defense Logistics Agency (DLA), requests an advance decision as to the propriety of making payment to the Fermont Division of the Dynamics Corporation of America (Fermont) for $452.58. Fermont requests DLA reimburse it this amount on the grounds that DLA improperly computed prompt payment discounts under contract number DAAG53–76–C–0225 on the adjusted invoice price instead of on the lower original bid price. For the reasons stated below, we find Fermont is not entitled to payment of the discount.

The record discloses that under the terms of the contract Fermont offered a one-tenth of one percent discount for prompt payments by DLA and that DLA, in computing the amount of the discount, applied the discount against not only the original contract price but also against $452,584.39 representing an amount by which the original contract price was increased under the contract's Price Escalation clause.

Fermont contends DLA is prohibited from computing the prompt payment discount on the adjusted contract price. It points out that the Armed Services Board of Contract Appeals (ASBCA) decided in *Jets Services, Inc.*, ASBCA 19070, 74–1 BCA 10649 (1974), that under a contract with a price adjustment clause a prompt payment discount should be taken on the lower original contract price rather than on the contract price as adjusted to compensate for a Department of

Labor mandated wage increase made pursuant to the Service Contract Act, 41 U.S.C. § 351 (1976). DLA believes the *Jets Services, Inc.* decision is not dispositive of the issue because the facts in that case are not similar to the facts here. We agree with DLA.

In the *Jets Services, Inc.* decision, the Board found that the contractor's usual procedure in constructing its bid or proposal prices was to calculate its estimated direct and indirect costs, add the desired profit, and add to the total 11.11 percent. The contractor added 11.11 percent to its prices to offset the effect of the Government's taking the offered 10 percent prompt payment discount and so leave the contractor with receipts equalling its incurred costs plus desired profit. The ASBCA then interpreted the contract's price adjustment clause by which the contractor warranted that the contract prices "do not include any allowance for any contingency to cover increased costs for which adjustment is provided under the clause * * *" and held:

> In our view the *quid pro quo* for the warranty made by the appellant under paragraph (a) was a guarantee that appellant would recover its direct cost increases flowing from a revised wage determination. It is clear that if the Government were permitted to take the prompt payment discount on the basis of a contract price so increased, appellant would not recover the full amount of its increased direct costs. Such a result is inconsistent with the intent of the Price Adjustment clause and would further penalize appellant for circumstances which it is not entitled to take into account when it prepared its Proposal.

In this case, the price escalation clause does not contain a warranty similar to the one that was dispositive of the holding in *Jets Services, Inc., supra.* Nor does this clause indicate that Fermont would not be compensated for both its increased costs and additional profit based on those increased costs. The clause provides that the original contract price shall be adjusted to reflect increases and decreases in the Wholesale Prices and Price Indexes and has the effect of keeping the unit prices—including profit—of those items listed in the contract abreast of price increases for that industry. (In contrast, DLA now uses a revised economic price adjustment clause which contains a warranty that effectively is identical to the warranty in *Jets Services, Inc., supra,* and which limits the amount of increase to increases in labor and material costs.)

Where, as here, a contractor is compensated not only for its increased costs but also is allowed to obtain additional profit based on those increased costs, application of the prompt payment discount against the adjusted contract price would not be inconsistent with the price adjustment clause and would therefore appear not to be inconsistent with the intention of the parties.

Fermont is not entitled to return of the discount.

[B-193927]

Courts—Judgments, Decrees, etc.—Interest—Delayed Payment of Judgment—Government Appeal—Disposition Not On The Merits

The permanent indefinite appropriation for payment of judgments (31 U.S.C. 724a) is available to pay interest to a plaintiff whose judgment payment was delayed solely because the United States appealed and lost. *Vaillancourt* v. *United States* extended this principle to apply to situations in which the United States withdrew its appeal without a disposition of the case on its merits. Payment of interest will also be permitted when Government appeals denial of motion under Federal Rule of Civil Procedure (FRCP) 60(b) to reopen judgment on collateral issue and not on merits of the underlying judgment, since plaintiff's delay in receiving payment was caused by Government's unsuccessful appeal. 58 Comp. Gen. 67, modified (extended).

Matter of: *Edmonds* v. *United States* and *Herbert* v. *United States*; Payment of Interest on Judgment, February 13, 1980:

This decision is in response to a request by the legal representative of the classes of plaintiffs involved in *Edmonds* v. *United States*, *Switzer* v. *United States*, *Wood* v. *United States*, and *Herbert* v. *United States*, that interest be paid on judgments rendered for the plaintiffs in the respective cases. For the reasons stated below, interest should be paid on those judgments not paid prior to November 30, 1978, when the Government's appeal was dismissed. The interest period would run from the date the transcripts of the judgments were filed with the General Accounting Office to November 30, 1978.

The plaintiffs were awarded judgments in their cases (the merits of which are not relevant to this discussion) and duly filed transcripts of the judgments with this Office in accordance with 31 U.S.C. § 724a (1976). The transcripts were filed with us between August 10 and September 25, 1978. The judgments directed that payment be made in a lump sum to the Clerk of the District Court who would then distribute the money to the individual plaintiffs. After the Clerk had received the six checks that were involved from the Department of the Treasury but prior to distribution of the funds, the Internal Revenue Service (IRS) asked that taxes be withheld from the judgments. This request was not complied with because the judgments directed payment of the gross amount without providing that taxes be withheld. The United States then filed motions to restrain distribution of the judgment money and to amend the judgments to require withholding. The District Court denied these motions. On November 9, 1978, the United States filed a notice of appeal from the denial of these motions with the Court of Appeals for the Fourth Circuit. On November 30, 1978, 3 weeks later, the parties entered into a stipulation dismissing the appeal.

The plaintiffs contend that they are entitled to be paid interest on their original judgments because of the delay they encountered in receiving their money. They base this contention on a recent decision rendered by this Office which held that interest could be paid on a judgment against the United States, where the United States appealed the judgment and the appeal was subsequently dismissed by stipulation of the parties. *Vaillancourt* v. *United States—Payment of Interest on Judgment*, 58 Comp. Gen. 67 (1978). The plaintiffs argue that *Vaillancourt* is directly applicable to their situation.

In *Vaillancourt*, the appeal by the United States was dismissed by stipulation of the parties, one year after it was taken, without any Court review of the case on its merits. The judgment to which the plaintiffs were entitled was thus tied up for almost 9 months, until the Department of Justice certified to us that no further proceedings reviewing the judgment would be taken. Our Claims Division originally denied the plaintiffs' claim for interest because 31 U.S.C. § 724a (1976), governing the payment of interest on judgments, provides that interest is payable only when the judgment has—

> * * * become final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance.

At that time, this statute had been interpreted as contemplating and requiring a review of the case on its merits, since a mandate of affirmance is used, procedurally, to rule on the merits. B–145389, April 18, 1961.

In *Vaillancourt*, we held, on reconsideration, that a review of the case on its merits is not necessary to the payment of interest under 31 U.S.C. § 724a as long as the delay encountered by the plaintiff in receiving his money was caused by the United States' appeal of the case. This decision was reached after careful consideration of the legislative history of the statutes involving the payment of interest, including 31 U.S.C. § 724a and 28 U.S.C. § 2516(b). We stated our belief that the Congress never contemplated a situation where an appeal would be filed and eventually dismissed, without an actual review of the case on its merits. When the interest statutes were enacted with language requiring a "review on appeal or petition" and a "mandate of affirmance," it was apparently assumed that this treatment would cover any possible situation in which payment of a judgment was delayed by further litigation by the United States. When we considered the problem in *Vaillancourt*, we extended our interpretation of 31 U.S.C. § 724a to allow interest on a judgment which was delayed when the United States appealed but failed to pursue the appeal, because the basic purpose of the statute, as supported by the legislative history, is to compensate a successful plain-

tiff for the delay in receiving his money judgment attributable solely to Government action or inaction.

In the instant case, the appeal was not from the original judgment, but from the denial of a motion filed under Rule 60(b)(6), Federal Rules of Civil Procedure (FRCP), asking the District Court to reopen the judgment so that taxes could be withheld from the payments. The FRCP 60(b) motion is used to ask the court for relief from a judgment on grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or for any other reasons justifying relief. This motion is viewed as independent from the original proceeding. *Shay v. Agricultural Stabilization and Conservation State Committee for Arizona, et al.*, 299 F. 2d 516 (9th Cir. 1962). Although the question raised on this appeal has been regarded as a collateral issue, unrelated to the merits of the underlying judgment, the appeal did delay the payment of the judgment in the same manner as a direct appeal on the merits of the judgment. Thus, we believe that the rule in *Vaillancourt* applies in this situation too. Therefore, interest should be paid to all those plaintiffs in this case, payment of whose judgments was delayed as a result of the appeal under FRCP 60(b)(6), from the date the transcript was filed with the GAO to November 30, 1978, the date the appeal was dismissed.

[B-196859]

Compensation—Removals, Suspensions, etc.—Back Pay—Back Pay Act of 1966—Allowances—Overseas Employees

Civilian employee of Air Force stationed in Japan upon involuntary dismissal returned to United States. She contested dismissal and was reinstated to the position with backpay under 5 U.S.C. 5596. The backpay award includes allowances for housing and cost of living which are paid employees working in high cost areas overseas even though the employee is not present in that area during period of wrongful dismissal.

Matter of: Norma J. Raymond, February 19, 1980:

The question is whether an employee who is awarded backpay under the Back Pay Act (Act), 5 U.S.C. § 5596, for a wrongful dismissal is entitled to receive allowances provided to compensate the employee for being assigned to a high cost area when the employee is not present at the high cost area during the period of wrongful dismissal. Since the Act provides for payment of all allowances the employee would have earned if the improper dismissal had not occurred, she is entitled to receive the allowances in question.

The question is presented for an advance decision by Captain Ronald M. Oberbillig, Accounting and Finance Officer, Kadena Air Base,

Japan, and concerns an award made to Norma J. Raymond, a civilian employee of the Air Force.

Ms. Raymond was separated from her position of Supervisory Recreation Specialist—Service Club Activity, 18th Combat Support, Kadena Air Base, Japan, based on unsatisfactory performance of duty. She returned to the United States and appealed her dismissal to the Merit Systems Protection Board and was awarded retroactive restoration and backpay under the Act. The employee did not return to Japan but rather resigned shortly after her reinstatement.

At the time of her dismissal, Ms. Raymond was receiving:

1. basic pay,
2. post differential,
3. premium pay,
4. living quarters allowance, and
5. post allowance (cost of living)

The Accounting and Finance Officer states that Ms. Raymond has received an award in accordance with the provisions for backpay computation as specified in Federal Personnel Manual (FPM) Supplement 990–2, § 8–6 (June 16, 1977). However, he has withheld the computed amounts for living quarters allowance and post allowance. While he recognizes that FPM Supplement 990–2, § 8 58–6.c(3) states that an employee's award should include all allowances even if the employee does not physically remain in the location giving rise to the allowance, he questions whether the Comptroller General decisions and Court of Claims decision referenced in the regulation are adequate authority to pay the allowances in this case. Based on the cases cited in the regulation and the authorities upon which they rely, the officer finds that the implication is that presence in the foreign area is a requirement before entitlement can be established.

In a Court of Claims' case involving a wrongfully dismissed civilian employee of the Air Force stationed at an Air Base in Japan, the question as to payment of living quarters allowances arose. The Court held that the employee was entitled to receive the living quarters allowance for his entire period of dismissal even though he was not present in Japan for the entire period of his wrongful separation. *Urbina* v. *United States*, 428 F. 2d 1280 (Ct. Cl. 1970). The Court reasoned that the subsections of the Back Pay Act, which provide that an employee is entitled to all allowances he would have earned but for the period of wrongful dismissal and that for all purposes, the employee is deemed to have performed services for the agency during this period, required this result. *Urbina* v. *United States*, *supra*, at 1285 discussing 5 U.S.C. §§ 5596(A) and (B).

On the basis of the *Urbina* case, the employee may receive payment of the withheld living quarters allowance. Further, we find the reason-

ing in that decision applicable to payment of post allowance and find that that allowance is also payable.

Accordingly the voucher is being returned for payment if otherwise correct.

[B-195617]

General Accounting Office—Jurisdiction—Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Adequacy

General Accounting Office will consider protest from bidder alleging arbitrary rejection of bid when contracting agency utilizes procurement system to aid in determination of whether to contract out by spelling out in solicitation circumstances under which contractor will or will not be awarded contract.

Contracts—Negotiation—Cost, etc. Data—Cost Comparisons—Government Estimates—Timeliness

Provision in agency's cost comparison manual containing procedures to determine whether to contract out—that in-house cost estimate should be submitted to contracting officer at least 2 days prior to "start of negotiations"—is unclear. Recommendation is made that agency clarify manual with respect to when cost estimate should be submitted to contracting officer.

Contracts—Protests—Allegations—Not Supported by Record—Disclosure of Pricing, Technical, etc. Data

Where protester's contentions—that agency took advantage of protester's proposal in preparing in-house cost estimate regarding reduced staffing from the current level of 329 to 259 and other matters—and agency's directly conflicting explanation constitute only evidence, protester has not met burden of proving its case by clear and convincing evidence.

Contracts—Negotiation—Cost, etc. Data—Cost Comparisons—Government Estimates

Contention—that cost comparison was incorrect because agency assessed protester $2,139,290 representing personnel relocation-related expenses associated with contracting out—is without merit where agency's explanation for assessment is reasonably based.

Contracts — Protests — Timeliness — Solicitation Improprieties — Apparent Prior to Closing Date For Receipt of Proposals

Contention—that request for proposals should not have contained provision assessing contractor $750,000 for new equipment associated with contracting out—first raised after closing date for receipt of initial proposals is untimely under GAO Bid Protest Procedures, 4 C.F.R. 20.2(b)(1) (1979), and will not be considered on merits.

Contracts — Negotiation — Evaluation Factors — Labor Costs — Fringe Benefits — Contracting Out Cost Comparison

Contention—that agency should have used fringe benefit factor of 38 percent instead of 8.44-percent factor used to assess cost of Government of continuing to perform in-house—is without merit where agency explains that Public Law No. 95-485 required use of policies in effect prior to June 30, 1976, and the factor then in effect was 8.44 percent.

Contracts — Negotiation — Offers and Proposals — Preparation — Costs — Recovery

Claim for proposal preparation costs is denied where record shows that protester was not arbitrarily treated, was not improperly induced to submit proposal where no contract was contemplated, or was not denied contract which it would have received.

Matter of: Jets, Inc., February 21, 1980:

Jets, Inc., protests an Air Force determination that base operating support services at Newark Air Force Station, Ohio, would be performed at a lower overall cost to the Government by continuing performance by Government personnel rather than contracting with Jets. The Air Force obtained the cost of contracting by evaluating Jets' proposal—the only proposal received in response to request for proposals (RFP) No. F33600-79-R-0294. The cost of continued Government personnel performance was estimated by a management engineering team (MET) based on the 654-page statement of work contained in the RFP. Jets contends that the procedures followed by the Air Force in reaching the determination violated mandatory requirements and that the costs comparison is incorrect and was not performed in good faith. Jets claims that it should receive the award or that it is entitled to proposal preparation costs.

Initially we point out that the underlying determination involved here—whether this work should be performed in-house by Government personnel or performed by a contractor—is one which is a matter of executive branch policy not within our protest function. *Local F76, International Association of Firefighters*, B-194084, March 28, 1979, 79-1 CPD 209. At the same time, preserving the integrity of the procurement system is within our protest function. Recently, we stated that where, as here, a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, by spelling out in a solicitation the circumstances under which a contractor will or will not be awarded a contract, a protest from a bidder alleging that its bid has been arbitrarily rejected will be considered by our Office. See *Crown Laundry and Dry Cleaners, Inc.*, B-194505, July 18, 1979, 79-2 CPD 38; *Locals 1857 and 987, American Federation of Government Employees*, B-195733, B-196117, February 4, 1980, 80-1 CPD 89. Hence, Jets' protest will be considered.

For the reasons stated herein, both the protest and claim are denied.

1. Was the In-House Estimate Timely Completed and Sealed?

Jets argues that applicable Air Force policy and procedures required that the estimated cost to continue performance with Govern-

ment personnel should have been completed and sealed prior to the date for receipt of initial proposals under the RFP, April 23, 1979. That was not initially done until May 16, 1979. Jets contends that, before the Government estimate was completed, personnel performing the in-house estimate had knowledge of its proposed manning, proposed costs, and the names and salaries of proposed supervisors. Jets concludes that the Air Force's failure to follow the requirement to complete and seal the Government estimate prior to receipt of initial proposals compromised the integrity of the competitive procurement system.

Jets points to the following section of Air Force Manual (AFM) 26–1 as establishing the requirement that the in-house estimate must be completed and sealed prior to the receipt of initial proposals:

> 1–20. Negotiated Procurement Procedures:
>
> a. General. Under negotiated procurement, public disclosure of the contract price cannot be made until after award. This is necessary to preserve the integrity of the procurement process * * *. Additionally the in-house cost estimate * * * must be submitted to the contracting officer in a sealed envelope no earlier than seven days and no later than two days before *the start of negotiations*. Under no circumstances will the in-house cost estimate be provided to personnel involved in the negotiation or evaluation of contractor proposals until the most favorable offer to the Government has been determined. [Italic supplied.]

Jets also points to a letter dated August 30, 1978, from Headquarters, Department of the Air Force, regarding implementation of the cost comparisons procedures of AFM 26–1, which contained examples of required milestone charts. Both examples showed that the in-house estimate was completed and sealed prior to receipt of initial proposals or bid opening. Further, on the sample milestone chart, the receipt of initial proposals and the start of negotiations were the same date.

In response, the Air Force essentially denies any improprieties in the process and argues that (1) since the milestone schedule is a sample, it cannot be assumed that this sample chart must be complied with for each and every Air Force cost comparison, and (2) the Air Force did not intend the "start of negotiations" to be interpreted as the submittal of initial proposals; instead, the term negotiations as used in AFM 26–1 clearly anticipates the start of "final negotiations."

It is not clear to us when the start of negotiations takes place within the meaning of AFM 26–1. It could start, as Jets contends, when the initial proposals are submitted. In any event, we believe the pertinent question is whether a fair and reasonable cost comparison was made, not whether the sealed in-house cost estimate was submitted late to the contracting officer. Therefore, we need only consider Jets' contention that the cost comparison was incorrect and not performed in good faith, although by separate letter we are recommending that the Air Force

clarify AFM 26–1 with respect to when the cost estimate should be submitted to the contracting officer.

II. Did the Air Force Use Jets' Ideas in Preparing the In-House Estimate?

Jets contends that the Air Force took advantage of ideas and manning structures that it proposed in making the in-house estimate. Jets principally argues that the Air Force's in-house staffing estimate was reduced from an authorized strength of 329 to 259 compared to Jets' proposed 256; Jets believes that this similarity in staffing was not coincidental. Jets also questions why the Government did not accomplish this cost saving years ago. Jets also refers to a July 19, 1979, memo from an Air Force commander stating that "[t]he following organizational structure is the one I have concurred to *as a counter proposal to contracting* the communications support at Newark AFS * * *." Jets asks how did he know the details of the contractor proposal. Further, Jets notes that on July 25, 1979, signs appeared on bulletin boards at the air station reading "We Won," "No Contractor," etc., and yet in accord with AFM 26–1 the amount of the estimated contract cost was not to be revealed at that time.

In response, the Air Force explains that AFM 26–1 requires the Air Force to base the in-house estimate on the number of civilian man-years required to perform the same workload and standard of performance in the RFP's statement of work. Management engineering techniques were used to price the RFP's statement of work to determine the minimum manning sufficient to perform the statement of work; that method is somewhat analogous to zero-based budgeting and allows the Air Force to determine where efficiencies can be achieved. The Air Force is not permitted by AFM 26–1 to use the current manpower authorization or the actual people employed to cost the in-house estimate. The Air Force also reports that on August 3, 1979, Air Force Headquarters directed a reduction in the manning level to 259 man-years and as of October 1, 1979, the onboard civilian strength was less than 259 personnel; onboard strength as of November 20, 1979, is below the 259 level and will remain at or below the 259 man-year level unless validated workload changes dictate otherwise.

Regarding the July 19 memo, the Air Force reports that the commander had no knowledge of the contractor's proposal; instead, this message was the culmination of discussions and correspondence started in February 1979 concerning the manning and organizational configuration of the communications operating location. The operating location chief disagreed with the commander over the number of in-house people to be used and the disagreement was resolved with the "counter-proposal" message, which refers to comments of the operating location chief, and was not intended to be a proposal to counter the Jets' offer.

Concerning the "we won" notices on the base, the Air Force investigated and reports that it found no evidence that Air Force personnel leaked information concerning the contractor's offer. Since such posting took place after the Government's estimate was revealed, the Air Force suggests that it was equally possible that contractor personnel or their relatives who knew the amount of the contractor's proposal and, after opening of the Government's estimate, knew that their offer was higher than the estimate may have revealed in a public place that the Government's estimate was low.

The record in each of the above three examples of alleged improprieties consists of Jets' view of the circumstances and the Air Force's conflicting view. In these matters, we have consistently stated that the protester has the burden of proving its case. See *Amex Systems, Inc.*, B–195684, November 29, 1979, 79–2 CPD 379 (protest was denied since we could not determine from the record that the Air Force's cost comparison was either faulty or misleading, as alleged); *Tri-States Service Company*, B–195642, January 8, 1980, 80–1 CPD 22 (protest was denied since we had no basis on the record to dispute the Army's cost comparison). Here, in view of (1) the Air Force's firm denial, that its personnel used information contained in Jets' proposal to make the in-house estimate, and (2) the protester's failure to produce clear and convincing evidence to support its position, this aspect of the protest is denied.

III. Was the Cost Comparison Faulty?

Regarding the Air Force's estimate of the contracting costs with Jets, Jets principally questions why it was charged with $2,139,290 in relocation expense, severance pay and retained pay for the entire present manning of 329 when, in fact, the contractor would hire some 70 percent of the incumbent personnel and no relocation nor retained pay would be involved for them. Further, in Jets' view, the Government's cost should have been increased accordingly for those 70 people for relocation costs, severance pay and retained pay.

Jets also questions why the Government required in the RFP that the contractor purchase some $750,000 worth of new equipment (vehicles, forklifts, tractors, etc.) when this identical equipment was in place as Government-owned equipment and then why the contractor was charged with the cost of shipping the Government equipment to other installations. Finally, Jets questions why the Government added only 8.44 percent to its salary costs for fringe benefits such as retirement, health and welfare, insurance, projected pay increases, when in actual fact these fringe benefits total about 38 percent of salaries.

We note that Jets raised other questions relative to the cost comparison but their resolution is unnecessary since they involve such a small amount of money relative to the in-house, 3-year estimate,

$14,372,687, as compared with the estimated cost of contracting with Jets, $20,937,335. Similarly Jets' objection to the Air Force using revised in-house estimate dated July 23, 1979, which reduced the in-house estimate by about $200,000, need not be considered because the difference is not determinative.

Regarding chargeable incumbent personnel expenses, the Air Force reports that there is no assurance that Jets would offer employment to 70 percent of the incumbent employees, or that any would accept the offer; experience shows that those higher graded employees involved would want to remain on the Federal payroll until they are eligible to retire; therefore, they would be willing to relocate. The data automation personnel have a valuable skill which is needed elsewhere in the Air Force to retain their current grade/pay and they, too, would be willing to relocate. Other employees with retained pay entitlement want to remain with the Air Force to retain the civil service retirement benefits. Further, the Air Force states that no relocation costs or severance pay expenses were charged to other than base operating support personnel because other surplus actions generated no separations or relocations; other surplus employees would be placed at or below their current grade. In essence, the Air Force estimates that there are no anticipated added costs chargeable to continued Government operation of this project by reason of the proposed personnel reduction; all personnel above the 259 figure will be absorbed by attrition, retirement, or other assignments. Finally, the Air Force notes that the base's capacity to absorb 47 people reduced the amount assessed against Jets for this cost category.

We have carefully examined the Air Force's position and Jets' contentions on incumbent personnel expenses and we have no basis to conclude that the Air Force's position is without a reasonable basis. Accordingly, this aspect of Jets' protest is denied.

Regarding the RFP's new equipment provisions, the Air Force reports that the decision not to furnish the equipment to any contractor was based upon requirements for the equipment at other Air Force bases to fulfill shortages and is in accordance with AFM 26–1. The Air Force notes, however, that Jets' protest on this issue is untimely since this requirement to furnish equipment was apparent in the solicitation. Therefore, Jets was required to file the protest prior to the date established for receipt of proposals in order for the protest to be timely under 4 C.F.R. § 20.2(b) (1) (1979).

On the timeliness of this aspect of Jets' protest, the Air Force is correct. Accordingly, we will not consider the merits of this portion of Jets' protest.

Regarding the fringe benefit factor, the Air Force reports that it was required by section 814 of Public Law No. 95–485, October 20, 1978, 92 Stat. 1625, 10 U.S. Code 2304 note, to use its June 30, 1976. regula-

tions and policies in conducting this contracting out cost comparison. The calculation in the Government in-house estimate of civilian personnel costs for the Government's contribution for retirement and disability, health insurance and life insurance prior to June 30, 1976, was 8.44 percent. Whether or not the 8.44-percent factor is an accurate estimate of actual costs, the Air Force explains that it was required to use this factor.

Jets has provided no basis for us to take exception to the Air Force's explanation. Therefore, this portion of Jets' protest is denied.

IV. Conclusion and Proposal Preparation Cost Claim

In conclusion, we have no basis to find that the Air Force's in-house and contractor cost estimates were faulty. Accordingly, based on the record, since Jets was not subject to arbitrary treatment, not improperly induced to submit a proposal where no contract was contemplated, or not denied a contract which it would have received, it is not entitled to proposal preparation costs. See *Rand Information Systems*, B-192608, September 11, 1978, 78-2 CPD 189.

[B-196470]

Contracts — Specifications — Deviations — Descriptive Literature — Conforming Clarification in Letter Accompanying Bid — Bid Responsive

No legal requirement exists which prohibits bidder from clarifying printed descriptive literature with letter accompanying bid, and where low bidder offers equipment which meets specification requirements plus features which are not required, bid is acceptable.

Contracts—Awards—Erroneous—Evaluation Improper

Contracting officer's refusal to accept bidder's clarification of preprinted descriptive literature was not reasonable where result was rejection of bid for equipment which met agency's minimum needs and award of contract at higher price.

Contracts — Termination — Convenience of Government — Erroneous Awards

Where contract is improperly awarded because of contracting officer's interpretation of contract specifications, agency should explore feasibility of such termination of contract for convenience of Government, as is consistent with fair and reasonable treatment of parties and in best interest of Government, i.e., at a reasonable cost and compatible with agency's need for equipment.

Matter of: EMI Medical, Inc., February 21, 1980:

EMI Medical, Inc., protests the award of contract #V797P-6696 by the Veterans Administration (VA) for six computerized tomography (CT) whole body scanners to Pfizer, Inc. The award was made under invitation for bids (IFB) No. M6-3-79. EMI's low bid was rejected as nonresponsive after the contracting officer concluded that

its equipment, as described in the descriptive literature submitted in accordance with the requirements of the IFB, did not meet the specification requirements.

The portion of the specification in issue requires that the equipment "be capable of reconstructing absorption measurements and displaying the computed image in 45 seconds or less;" IFB amendment 2 stated that "the 45 seconds * * * applies to all of manufacturers standard tomography scan modes regardless of the quantity of data collected." The issue in this case is the interpretation of the foregoing specification.

CT body scanning equipment combines low level x-ray imaging and data processing so as to visualize cross sectional "slices" of the human body for medical diagnostic purposes. The patient being "scanned" reposes on a couch or table which is precisely moved through the x-ray source. The x-ray source rotates around the patient in a full circle (360 degrees) emitting controlled "beams" as it rotates. Unlike familiar x-ray equipment, the "beams" do not expose film; rather they are received by "receptors" or "detector arrays" which, depending on the manufacturer either rotate with the x-ray source (rotate/rotate geometry) or are fixed throughout the circle (rotate/stationary geometry). The equipment views the patient at various points (which correspond to the angular position of each degree or partial degree of the circle) throughout its 360 degrees of rotation, and the electronic data acquired by the detector array is processed by a computer which ultimately "reconstructs" the image for display on a video monitor. Without here attempting to elaborate on the precise mathematics involved with each scan "slice," the number of individual data elements to be processed by the computer is a function of the number of views taken times the number of individual elements in the detector array for each 360 degrees of rotation, or close to 200,000 data elements for the EMI equipment in its 360 (one view per degree of rotation) scan mode. The reconstruction time in question is the time necessary for the computer to process this data to reconstruct the video image. The image is not transitory because the data is stored in the computer and can be recalled; the video image can be photographed; or the data can be printed as hard copy. Finally, a technique used to increase picture resolution is to increase the amount of data collected, *i.e.*, resolution increases as the number of views increases.

The EMI equipment proposed operates on the rotate/rotate geometry and has the capability of scanning in 3 distinct scan modes, *i.e.*, 360 (1 view per degree of rotation), 540 (1 view per ⅔ degree), and 1080 (1 view per ⅓ degree). For the EMI equipment complete scans can be accomplished in 5, 10 or 20 seconds as selected by the equipment operator. EMI claims that as a practical matter, picture resolution does not improve beyond the 540 scan mode, and there is no evidence

on the record to contradict that assertion. The Pfizer equipment offered operates on the rotate/stationary geometry principle and as we understand it, the number of views is fixed by the position of the stationary detectors, *i.e.*, 600 in the case of the Pfizer equipment. However, the IFB did not specify any particular data collection geometry, and indeed the IFB's avowed purpose, according to the contracting officer, was to maximize competition by not limiting acceptable equipment to any specific design.

EMI's preprinted description literature, submitted with its bid, showed scan speeds as 5, 10 or 20 seconds; scan modes as 360, 540 or 1080; and reconstruction time as "40 seconds or less for 360 views." However, accompanying the bid was a letter which stated that:

> The "standard operating modes" of the EMI–6000 General Diagnostic CT Scanner System are:
> 1. 360 views
> 2. 540 views
>
> EMI certifies reconstruction time for both modes shall be 45 seconds or less.
>
> The third mode, 1080, views, is a specialized technique used only for radiation therapy planning studies and not utilized in routine diagnostic studies, in other words, an extra capability not required in the specifications.

The contracting officer rejected the EMI bid as nonresponsive, on the theory that any scan made available on the system is a "standard feature;" the 1080 scan mode will not reconstruct in 45 seconds or less and therefore the equipment does not comport with the specifications. The contracting officer does not suggest that the EMI equipment operating in its 360 or 540 modes does not meet its requirements, and at a conference held on this protest, he admitted that the EMI equipment would be acceptable if the 1080 scan mode were not included in the equipment or the printed literature. In this respect, EMI suggests that it could have deleted that capability if it thought that was necessary to meet the specification requirements.

To be responsible, a bid must comply in all material respects with the IFB, *i.e.*, where a bidder has promised to deliver exactly what was called for in the invitation, within the time periods specified, and in accordance with the terms and conditions of the invitation, the bid is responsive. *J. Baranello and Sons*, 58 Comp. Gen. 509 (1979), 79–1 CPD 322. The purpose of a descriptive literature requirement is to determine if the supplies offered comply with the requirements of the specifications, and where such literature indicates a deviation from such specifications, the bid is properly rejected as nonresponsive. *See E–M Southwest, Inc.*, B–193299, March 29, 1979, 79–1 CPD 217. We are aware of no requirement, however, which prohibits a bidder from clarifying its preprinted descriptive literature by a letter accompanying the bid which obligates the bidder to contract performance as required. Indeed Pfizer amplified its own printed literature for that purpose.

As we have noted earlier, the contracting officer based his decision

to reject the EMI bid solely on the basis that the 1080 scan mode is available on the system, with no consideration of the qualifying language of the EMI letter. Thus in his report on the protest, the contracting officer stated "there is no alluding to radiation therapy planning application for any of the views," and "if the 1080 view scan mode is available on the system, *and whether used or not*, it is a standard feature and not a specialized feature as cited in EMI's letter." We find the contracting officer's conclusion unreasonable under the circumstances. For example, under the IFB, the EMI equipment sans the 1080 mode was acceptable according to the VA's interpretation of its own specification.

Moreover, we believe it was reasonable for EMI, the manufacturer, to conclude that "manufacturers standard tomography scan mode" meant scan modes used for standard rather than specialized clinical applications; that it was necessary to clarify what is essentially sales literature prepared for other purpose so as not to run afoul of the language of the specification; and that it was not called upon to eliminate an equipment feature which was ordinarily included in its equipment to meet what might otherwise be interpreted as the requirements of the specifications. A bidder should not be prohibited from offering more than is required, so long as the item is otherwise in accord with the specifications and award is not based on the unsolicited features. To interpret the specifications otherwise has the effect of restricting rather than enhancing competition, the opposite effect desired by the agency. The final result was that the agency awarded a contract for a higher price, when from the record, it appears the lower priced unit would meet the agency's avowed minimum needs.

Pfizer has also suggested that the EMI equipment, as described in its literature, failed to meet § 1.f.3 of the specifications requirements that the physician's station provide for "independent manipulation of image content separate from operator's console." Pfizer, however, relies on its assertion of a generally understood "CT industry" standard and the ordinary interpretation of "independent manipulation" for its belief, but no evidence on our record is available to affirm or dispute that claim. The VA has not raised such an objection either in its original rejection of the EMI bid or after the matter was raised by Pfizer, and the asserted deficiency is not apparent from the record. In this respect, we point out that it is not generally the function of this Office to determine the technical adequacy of equipment offered to the Government, since that function is the primary responsibility of the procuring agency, which enjoys a reasonable range of discretion in these matters. Therefore, in the absence of a clear showing that the agency's determination was arbitrary or unreasonable, it will not be disturbed by GAO. *Cf. ITEL Corporation*, B-192139.7, October 18, 1979, 79-2 CPD 268 (a case involved with the determination of the

technical adequacy of a proposal under a negotiated procurement). We believe the contracting officer's statement that but for the 1080 scan mode, EMI's equipment was acceptable, can be reasonably taken to mean it disagrees with Pfizer in this respect.

As our discussion indicates, we believe the award should have been made to EMI in this instance, and an appropriate remedy would ordinarily be a recommendation that the contract awarded to Pfizer be terminated for the convenience of the Government. However, there are many factors involved in our consideration of whether such a recommendation would be in the best interest of the Government, including the cost to the Government, the extent of performance and the delays such a recommendation might entail. See *Cohu, Inc.*, 57 Comp. Gen. 759 (1978), 78-2 CPD 175. In this respect, the procurement has been delayed for several months, and termination and reaward may only enhance the delay in the delivery of essential medical equipment further. Also, Pfizer claims it has obligated itself to the extent of $1,686,000 for the parts and components necessary to manufacture the equipment. The foregoing is not wholly meaningful, however, because it does not take into consideration the actual liability the Government would incur by a termination of the Pfizer subcontracts, or the commercial value to Pfizer of the components already delivered to it. Under these circumstances, and in view of the $165,000 total difference in bid prices between EMI and Pfizer, we recommend the agency explore the feasibility of such termination of the Pfizer contract for the convenience of the Government and award to EMI as would be consistent with the fair and reasonable treatment of both EMI and Pfizer. We emphasize that any agreement with the parties be made with the best interest of the Government in mind, i.e., at a reasonable cost and compatible with the VA's need for this equipment.

The protest is sustained.

[B-195839]

General Accounting Office—Jurisdiction—Grants-In-Aid—Protests Against Grant Awards—No Authority To Consider—Exceptions

Although General Accounting Office does not review questions concerning agency decision denying grant award unless there is allegation that agency used grant award process to avoid competitive requirements of Federal procurement, where it appears that process of selecting grantee might have been influenced by conflict of interest, GAO will undertake review to determine whether process was tainted by favoritism or fraud.

Conflict of Interest Statutes—Violation Determinations—Grant Award

Record does not indicate agency acted improperly in making grant award to firm whose President had applied for agency's Regional Director position where evaluation and grant selection were performed at agency's centralized administrative office rather than by relevant regional office.

Matter of: Burgos & Associates, Inc., February 25, 1980:

Burgos & Associates, Inc. (Burgos) objects to the decision of the Department of Commerce's Minority Business Development Agency (MBDA) to award grant No. 02-10-45080-00 to Capital Formation Management Corporation (Capital Formation) to operate as a Business Development Organization (BDO) providing management and technical services to minority business firms in the New York City area.

Burgos maintains that MBDA improperly awarded the grant to Capital Formation because its President was recently selected as Regional Director of MBDA's New York Office. According to Burgos, the existence of, or potential for, a conflict of interest requires that Capital Formation's President remove himself from consideration of the MBDA position. In the event Capital Formation's President were to accept the position, Burgos contends this automatically should disqualify Capital Formation from being eligible for award.

Burgos also challenges the adequacy of the process by which the grant applications were evaluated. In particular, Burgos questions the large discrepancy among the evaluators' scoring of its application and the influence that one of the evaluation panel members had on the agency's ultimate decision to award the grant to Capital Formation.

This Office, in response to increasing concern that recipients of Federal grant funds were engaging in varied and perhaps inappropriate practices and procedures involving the award of contracts in supposed furtherance of grant purposes, has been considering complaints of prospective contractors concerning those grantee awards pursuant to its statutory obligation and authority under 31 U.S.C. § 53 (1976) to investigate the receipt, disbursement, and application of public funds. *See* Public Notice, 40 Fed. Reg. 42406 (1975). We have not, however, held ourselves out as a forum in which complaints concerning the actual award of grants or other assistance-type instruments could be aired, *see*, e.g., *Washington State Department of Transportation*, B-193600, January 16, 1979, 79-1 CPD 25, although we have considered the propriety of a grant award when it was alleged that the agency was using the grant award process to avoid the competition requirements of the Federal procurement laws and regulations. *Burgos & Associates, Inc.*, 58 Comp. Gen. 785 (1979), 79-2 CPD 194; *Bloomsbury West, Inc.*, B-194229, September 20, 1979, 79-2 CPD 205. See also *Tri-County Metropolitan Transportation District of Oregon*, B-190706, July 21, 1978, 78-2 CPD 58, where the grantor agency requested our decision as to whether it could properly provide grant funding in the particular circumstances present.

As we stated in our Public Notice, *supra*, it is not the intent of this Office to interfere with the functions and responsibilities of grantor agencies in making and administering grants. Accordingly, we decline

to review Burgos' challenge as to the adequacy of MBDA's evaluation process. However, we believe it would be consistent with our statutory obligation to investigate the receipt, disbursement, and application of public funds to consider the conflict of interest allegation, as we believe the grantor agency has an obligation to avoid making any grant awards which may be tainted by the existence of such a conflict. See generally 55 Comp. Gen. 681 (1976); *Eglin Manor, Inc.* v. *United States*, 279 F.2d 268 (Ct. Cl. 1960). In this regard, it has been held that contracts and other obligations between the United States and recipients of Federal funding may be rendered void and unenforceable where there is evidence that improper influence was used to secure award of a contract. See *Dougherty* v. *Aleutian Homes, Inc.*, 210 F. Supp. 658 (D. Ore. 1962) *citing Providence Tool Co.* v. *Norris*, 69 U.S. 45 (1864). Accordingly, where, as here, it appears that the process of selecting a grantee could have been influenced by a conflict of interest, we think it appropriate to consider the matter to determine whether the selection process was in fact tainted by favoritism or fraud. Consequently, we will consider the conflict of interest assertion.

The agency concedes that under the circumstances a potential for conflict of interest existed. It therefore had MBDA headquarters personnel in Washington, rather than its personnel in the New York Regional Office, conduct the evaluation of applications received in response to the grant solicitation and ultimately decide whether to select Capital Formation as the grantee. The agency further advises us that although Capital Formation's President was selected as the leading candidate for the New York Regional Director position on July 12, 1979, and Capital Formation received the grant award on August 1, 1979, the individual in question has not as yet been formally offered the position. Based on this information, we do not believe the individuals who evaluated Capital Formation's offer were improperly influenced by Capital Formation's President's being considered for the position of MBDA New York Regional Director. See *Iroquois Research Institute*, 55 Comp. Gen. 787, 794 (1976), 76-1 CPD 123.

Burgos nonetheless maintains that MBDA was obliged to require the President of Capital Formation to cease his attempt to be selected the New York Regional Director once his firm received the grant award. However, we are aware of no requirement which precludes an individual from seeking an award from a Federal agency for himself or his firm concurrent with his seeking employment from that agency.

It is, of course, incumbent upon the agency to avoid even the appearance of favoritism or preferential treatment by the Government towards a firm competing for a contract or assistance award. See *Scona, Inc.*, B-191894, January 23, 1979, 79-1 CPD 43; *Metro Electric, Inc.*, 58 Comp. Gen. 802 (1979), 79-2 CPD 226. When a procurement is conducted, for example, Federal Procurement Regulations § 1-1.302-3 (1964 ed.) prohibits contracting between the Government and its em-

ployees or businesses substantially owned or controlled by its employees. Although this regulation does not apply to the present case because the competition was for the award of a grant, it nevertheless reflects well established policy that such arrangements are undesirable and should be avoided because such relationships are open to criticism as to alleged favoritism and possible fraud. 55 Comp. Gen. 681, *supra;* 41 *id.* 569 (1962).

We are satisfied that MBDA acted properly here. The agency took adequate measures to shield the evaluators chosen to review the grant applications from any undue influence that Capital Formation might have had over MBDA personnel in the New York Regional Office by having MBDA headquarters personnel in Washington conduct the evaluation. Moreover, the agency states that if Capital Formation's President is eventually hired, it will take appropriate measures to avoid any actual or apparent conflicts of interest.

The complaint is denied in part and dismissed as to the remainder.

[B–195625]

Pay — Retired — Survivor Benefit Plan — Missing Persons — Computation of Annuity — After Date of Death Determination

Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. 552(a).

Matter of: Colonel Elton L. Perrine, USAF (Deceased), February 28, 1980:

This action is in response to a request for advance decision from the Air Force Accounting and Finance Center concerning the computation of annuity to be paid under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, to Mrs. Joyce A. Perrine, as widow of the late Colonel Elton L. Perrine, USAF. The matter has been assigned Control Number DO–AF–1328, by the Department of Defense Military Pay and Allowance Committee.

The reported facts are that the member, Elton L. Perrine, who was serving on active duty in the Air Force as a commissioned officer, was reported as missing in action (MIA) in Vietnam on May 22, 1967. While in that status, he was promoted to the permanent grade of lieutenant colonel (0–5), effective April 20, 1977, and to the temporary grade of Colonel (0–6), effective November 1, 1978. On February 6, 1979, his status was changed to killed in action for the purpose of terminating pay and allowances, settlement of accounts and payment of death gratuity.

As a result of that action, an SBP annuity account was opened in favor of Mrs. Perrine under the provisions of 10 U.S.C. 1448(d), effective February 7, 1979. The annuity payable to her was computed based on Colonel Perrine's rate of basic pay as a Lieutenant Colonel rather than that of Colonel because he had not held the grade of Colonel for a minimum of 6 months as required by 10 U.S.C. 8963(a), prior to the date he was declared dead.

In view of the foregoing and because of certain language in 37 U.S.C. 552(a) and its legislative history, uncertainty is indicated as to whether the annuity authorized to be paid Mrs. Perrine under 10 U.S.C. 1448(d) should be computed on the rate of basic pay of a Lieutenant Colonel or Colonel.

The provisions of the SBP authorizing payment of an annuity to surviving spouses of service members who die while serving on active duty are contained in 10 U.S.C. 1448(d). That subsection provides in part:

> (d) If a member of an armed force dies on active duty after he has * * * qualified for * * * [retired or retainer] pay except that he has not applied for or been granted that pay * * * the Secretary concerned shall pay to the spouse an annuity equal to * * * 55 percent of the retired or retainer pay to which the otherwise eligible spouse * * * would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

The basic concept of the SBP is to provide a means whereby a service member may provide his spouse and dependent children with financial protection in the form of an annuity in the event of his death. The basic provisions of the SBP only authorize payment of an annuity to a survivor of a member who dies while entitled to receive retired or retainer pay. However, under 10 U.S.C. 1448(d) a member with over 20 years of service and who is otherwise eligible to retire is covered by the SBP as if he had retired on the day he died.

As is indicated in the submission, the entitlement to an SBP annuity in such cases depends generally on the provisions of law governing retirement. As it relates to commissioned officers of the Air Force, those provisions would be 10 U.S.C. 8911, with retired pay computed under 10 U.S.C. 8991, based on years of service computed under 10 U.S.C. 8925, with grade on retirement established under 10 U.S.C. 8961 and 8963.

Section 8961 of title 10, United States Code, provides generally that a Regular or Reserve of the Air Force retiring for other than physical disability retires in the grade held at retirement. However, section 8963 of the same title restricts the use of a temporary grade to those cases where the member had a minimum of 6 months satisfactory service in that temporary grade at retirement.

In 53 Comp. Gen. 887 (1974), we held that time spent in an MIA-status was qualifying service time for 10 U.S.C. 1448(d) annuity

computation purposes so long as the date of determination of death occurred after September 21, 1972, the date of enactment of the SBP. In the process of so concluding, we recognized that among those members who die while serving on active duty, those whose status came within the purview of the provision of the Missing Persons Act, 37 U.S.C. 551–558, occupy a special niche. That is, since it was not known if they were actually dead or alive, it was congressionally mandated that for the purpose of Federal benefits to the immediate families, continuation of the life of the member was presumed to exist until that status was later terminated for cause. Thus, the entitlement of survivors to receive Federal benefits based upon that status and termination thereof is to be established under those provisions.

Section 552 of title 37, United States Code, as amended by Public Law 93–26, approved April 27, 1973, 87 Stat. 26, provides in part:

> (a) A member of a uniformed service who is on active duty * * * and who is in a missing status, is—
>
> (1) for the period he is in that status, entitled to receive or have credited to his account the same pay and allowances, as defined in this chapter, to which he was entitled at the beginning of that period or may thereafter become entitled;
>
> * * * * * * *
>
> *Notwithstanding section 1523 of title 10 or any other provision of law, the promotion of a member while he is in a missing status is fully effective for all purposes, even though the Secretary concerned determines * * * that the member died before the promotion was made.* [Italic supplied.]

The legislative history of the underscored sentence shows that it was originally added to section 552 by section 1 of Public Law 92–169, November 24, 1971, 85 Stat. 489; inadvertently repealed by Public Law 92–428, October 13, 1972; and reenacted by section 1 of Public Law 93–26, April 27, 1973, 87 Stat. 26. The purpose was to "insure that promotions * * * are valid for all purposes, including Federal benefits to survivors," and to "assure that survivors of members * * * in a missing status and promoted * * * will not be deprived of benefits based on that promotion." See U.S. Code Cong. and Adm. News (1973), pages 1293 and 1294.

In light of the foregoing, survivor benefits under the SBP are included in the package of survivor entitlements under 37 U.S.C. 551–558. Further, in view of the fact that promotions made under those provisions are "fully effective for all purposes," it is our view that the limitation contained in 10 U.S.C. 8963(a) restricting the use of a promotion to a temporary grade for retired pay computation purposes is not for application in establishing an SBP annuity under 10 U.S.C. 1448(d) to the surviving spouse of a member in cases covered by the missing persons provisions.

Accordingly, the SBP annuity due in Mrs. Perrine's case is to be computed based on the late Colonel Perrine's grade of Colonel (O–6), effective February 7, 1979, and the voucher is being returned to the finance and accounting officer for payment, if otherwise correct.

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